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No. 93-941

In the Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF DETROIT, ET AL., PETITIONERS

v.

RONALD H. BROWN, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts properly dismissed petitioners' claim that undercounts in the 1990 decennial census violated the Apportionment Clause of the Constitution, Art. I, § 2, Cl. 3.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 4 F.3d 1367. The opinion of the district court (Pet. App. 26a-44a) is reported at 800 F. Supp. 539.

JURISDICTION

The judgment of the court of appeals was issued on September 22, 1993. The petition for a writ of certiorari was filed on December 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Article I, § 2, Cl. 3, of the Constitution requires Congress to conduct a decennial census for the purpose of determining the number of Representatives to which each State is entitled in the United States House of Representatives. That Clause provides that the "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers" and directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."

The statutory implementation of that process appears in Title 13 and in 2 U.S.C. 2a. Pursuant to Title 13, the Secretary must complete and report to the President a "tabulation of total population by States" for the purpose of apportionment of congressional seats within nine months after the census date. 13 U.S.C. 141(b). The statute does not set forth detailed methodological requirements, but instead vests discretion in the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). After the census has been completed, and within a week after the beginning of the first session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in each State * * * and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions." 2 U.S.C. 2a(a). Finally, within 15 days of the receipt of the statement, the Clerk of the

House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled under [2 U.S.C. 2a]." 2 U.S.C. 2a(b). See generally *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992); *Department of Commerce* v. *Montana*, 112 S. Ct. 1415 (1992).

2. The "actual Enumeration" required by the Constitution always has been made through an actual count of individuals, rather than statistical estimations, even though there have been concerns about undercounts from the time of the first census in 1790. See *Carey* v. *Klutznick*, 653 F.2d 732, 735 (2d Cir. 1981), cert. denied, 455 U.S. 999 (1982). In connection with the 1980 and 1990 censuses, the Census Bureau[1] has considered proposals to adjust the actual headcount statistically. Both the 1980 and 1990 censuses have spawned considerable litigation by States (and their localities and citizens) that have believed that they would fare better if the headcount were adjusted statistically to compensate for the undercount.[2] In 1987, the Commerce Department decided that it would not make a statistical adjustment to the 1990 census headcount. In July of 1989, however, the Department agreed to vacate that decision in a stipulation in an action brought by New York and other parties in the United States District Court for the Eastern District of New York. See *City of New York* v. *Department of Commerce*, 739 F. Supp. 761, 763 (1990). In the stipulation, the Department agreed to undertake de novo consideration of the adjustment question, and to issue a final decision no later than July 15, 1991. *Id.* at 769. While

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[1] The Census Bureau is "an agency within, and under the jurisdiction of, the Department of Commerce." 13 U.S.C. 2.

[2] See *Carey*, 653 F.2d at 735 n.19 (citing 49 cases seeking adjustments to the 1980 census).

that reconsideration took place, the Executive Branch complied with the statutory mandate of the Census Act: the census count was completed, and the President transmitted the census results to Congress within the time limitations set forth in 2 U.S.C. 2a(a). As required by 2 U.S.C. 2a(b), the Clerk of the House certified to each State the number of Representatives to which it is entitled under those figures.

On July 15, 1991, the Secretary determined that the census headcount should not be adjusted on the basis of a statistical methodology. 56 Fed. Reg. 33,582. The Secretary recognized the existence of undercounts in the census tabulation, but concluded that it was unclear that adjusting the headcount would improve the accuracy of the census and that adjustment might introduce new distortions as well as new fears of political manipulation. *Id.* at 33,582-33,583.

The Secretary explained that the Census Bureau had conducted an intensive investigation into an adjustment technique that relied primarily on a process known as dual system estimation. In that process, the Secretary conducted a post-census sample survey—the post-enumeration survey (PES)—of approximately 170,000 housing units in 12,000 blocks across the nation, representing about one-sixth of one percent of the population of the United States. The blocks were selected to ensure that they included representatives of 1392 population subgroups known as "post-strata," designed to reflect all of the various demographic components of the nation's population. The information gathered from the PES was obtained during the census for the relevant blocks. By comparing the data, an adjustment factor was developed for each post-stratum that reflects the percent by which the PES indicated that the census overcounted or undercounted the population in that post-stratum. An

adjustment would have been accomplished by multiplying the number of people from each post-stratum that the census located in each of the almost 5,000,000 blocks nationwide by the appropriate adjustment factor for that post-stratum. See 56 Fed. Reg. 33,626-33,636 (1991); see also David A. Freedman, *Adjusting the 1990 Census*, 252 Sci. 1233, 1234-1236 (1991) (providing a concise description of the process).

Opinions among career professionals at the Census Bureau, and among a panel of outside experts including some of the most highly regarded statisticians in the country, were sharply divided over the accuracy and efficacy of this method of adjustment. See, *e.g.*, 56 Fed. Reg. 33,610-33,623 (1991) (recommendations of panel members). The Secretary determined that because the constitutional purpose of the census is to apportion seats in the House of Representatives, accuracy for adjustment purposes must be defined to mean "distributive accuracy—that is, getting most nearly correct the proportions of people in different areas"—as opposed to an improvement in the accuracy of the total population count at the national level. *Id.* at 33,584; see *id.* at 33,593. Having considered advice both in favor of, and in opposition to, adjustment, the Secretary concluded that there was no clear evidence that an adjustment would improve the distribution of the population, and therefore that no adjustment should be made.

The administrative record provided considerable information regarding the effect the proposed adjustment would have had on the census headcount. The Michigan headcount would have been adjusted upward from 9,295,297 to 9,404,000, but its percentage of the national

population would have declined from 3.7374% to 3.7027%.[3] The adjustment would not have altered the number of congressional seats allotted to Michigan, although it would have resulted in seats being gained by California and Arizona, at the expense of seats being lost by Wisconsin and Pennsylvania. See *Tucker* v. *Department of Commerce*, 958 F.2d 1411, 1413 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992).

3. Petitioners, the City of Detroit and its Mayor, filed this suit against the Secretary of Commerce and the Director of the Census Bureau. Petitioners contended, among other things, that a variety of errors made by respondents in connection with the 1990 census violated the Apportionment Clause of the Constitution, Art. I, § 2, Cl. 3. They did not allege that respondents' conduct caused Michigan to be underrepresented in the House of Representatives; rather, they contended that errors in the census count, and the decision not to use a statistical adjustment, caused Detroit to be disproportionately undercounted relative to other areas of Michigan. See Pet. App. 10a. Petitioners contended that they had standing to challenge respondents' conduct because Detroit's voting strength relative to the rest of the State had been diluted when the Michigan legislature used census figures to redistrict. Petitioners also asserted that they would receive less than an appropriate share of federal funds that are distributed on the basis of census data.

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[3] See Bureau of the Census, United States Department of Commerce, Press Release CB91-221, Table 5 (June 13, 1991). That table is included in Appendix 10 to the administrative record accompanying the Secretary's decision, which has been upheld by the district court for the Eastern District of New York. *City of New York* v. *Department of Commerce*, 822 F. Supp. 906 (1993), appeal pending, No. 93-6183 (2d Cir.) (argued Jan. 5, 1994).

The district court granted summary judgment for respondents. Pet. App. 26a-44a. First, the court concluded that petitioners lack standing. *Id.* at 32a-36a. The court explained that there was no causal nexus between their injuries (political underrepresentation within Michigan and loss of federal funds) and respondents' conduct, explaining that

> the Census Bureau neither creates state and federal legislative districts nor prescribes legislative spending. Those duties are reserved to the Michigan state legislature and Congress. Therefore, the conduct of intervening third parties, not the actions of [respondents], are directly responsible for [petitioners'] claimed injuries.

Id. at 33a. The court alternatively concluded that petitioners lack standing because they had failed to identify any specific constitutional violation for which there was a judicially manageable remedy. *Id.* at 35a-36a. Finally, the court concluded, on the merits, that petitioners had failed to establish a violation of the Constitution, based on its conclusion that the undisputed evidence established that respondents made a good-faith effort to conduct the census as accurately as practicable. *Id.* at 36a-44a.

4. The court of appeals affirmed. Pet. App. 1a-25a. Unlike the district court, the court concluded that petitioners did have standing. *Id.* at 10a-18a. The court accepted the district court's conclusion that any dilution of voting power within Michigan was not attributable to respondents' conduct, *id.* at 10a-14a, but accepted petitioners' argument that they have standing based on the effect of respondents' actions on federal funds, reasoning that "many federal programs do disburse funds based upon population figures as reported in the decennial cen-

sus," *id.* at 16a. Hence, the court concluded that petitioners "were directly affected by the action of [respondents] as that conduct affected *their* city and *their* funds." *Id.* at 18a.

On the merits, the court of appeals concluded that petitioners' suit should be dismissed for failure to state a violation of any judicially enforceable constitutional right. Pet. App. 18a-25a. The court started from the premise that the constitutional command that Congress conduct a decennial census would justify judicial review of a claim that "Congress or the Census Bureau failed (altogether) to conduct a decennial census or failed to conduct a good-faith enumeration, or intentionally reduced some group's representation or funding." *Id.* at 20a. Following the reasoning of the Seventh Circuit in *Tucker*, *supra*, the court reasoned, however, that "merely by directing congressional apportionment in accordance with the decennial census, [the Apportionment Clause] does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." Pet. App. 20a (quoting *Tucker*, 958 F.2d at 1418). Hence, the court rejected petitioners' challenge to the thoroughness of the Census Bureau's efforts in counting Detroit residents (a challenge not repeated in this Court), *id.* at 20a-22a, as well as their challenge to the Secretary's decision not to make a statistical adjustment to the actual enumeration, *id.* at 22a-25a. With respect to the latter claim, the court noted that the district court in *City of New York* v. *Department of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993), recently reviewed the statistical adjustment claim and concluded that the Secretary's adjustment decision was not arbitrary, capricious

or contrary to law.[4] Concluding that it would be "impractical for [the court of appeals] to order (the Secretary to do) * * * an adjustment [for Detroit alone] without considering the consequences for the other states and other cities," the court emphasized that petitioners "are not asking us to decree equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to a census headcount." Pet. App. 24a, 25a. The court accordingly upheld dismissal of petitioners' complaint. *Id.* at 25a.

ARGUMENT

Petitioners argue (Pet. 11-17) that the court of appeals erred in rejecting their claim that the Apportionment Clause entitles them to an order compelling a statistical adjustment to the 1990 census. That argument is incorrect and does not warrant review by this Court.

1. The Court's recent decision in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992) (which is neither cited nor discussed in the petition), makes it clear that the court of appeals correctly rejected petitioners' claims. As the Court explained in *Franklin*, a court evaluating a constitutional challenge to the census can only "review the dispute to the extent of determining whether the Secretary's interpretation is consistent with the constitutional language and the constitutional goal of equal representation." 112 S. Ct. at 2777; see *id.* at 2778 (a court should uphold a decision regarding census procedures if it is "consonant with, though not dictated by, the text and history of the Constitution"). Under that

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[4] An appeal of that decision is pending before the Second Circuit. No. 93-6183 (argued Jan. 5, 1994).

standard, petitioners' constitutional claims are meritless.

First, the practice challenged by petitioners is consistent with the constitutional language. The Apportionment Clause, Art. I, § 2, Cl. 3, requires an "actual Enumeration * * * in such Manner as [Congress] shall by Law direct." It is implausible to suggest that this Clause requires the government to forgo reliance on the "actual Enumeration," and instead to rely on statistical estimates, especially in light of the consistent practice, over two centuries, of relying on the actual headcount. Cf. *Franklin*, 112 S. Ct. at 2777 (noting importance of historical practice). Indeed, because the Constitution provides that the actual enumeration may be taken "in such Manner as [Congress] shall by Law direct," there can be no textual basis for setting aside any good-faith effort to conduct an "actual Enumeration." Cf. *Department of Commerce* v. *Montana*, 112 S. Ct. 1415, 1429 (1992) (considerable deference is due Congress's "apparently good-faith choice of a method of apportionment"). As the court of appeals observed, "merely by directing congressional apportionment in accordance with the decennial census, [the Apportionment Clause] does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." Pet. App. 20a (quoting *Tucker* v. *Department of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992)).

Second, the decision not to adjust does not undermine the goal of equal representation. The adjustment sought by petitioners would not affect the number of seats to which Michigan is entitled in the House of Representatives. See pp. 5-6 & n.3, *supra*; Pet. App. 10a & n.4. Also, the results of the census have no determinate effect on the allocation of those seats among the citizens of Michigan, or in the apportionment of local and state leg-

islative bodies, because neither the Constitution nor any federal statute requires the use of unadjusted census data for intrastate redistricting. See *Senate of California* v. *Mosbacher*, 968 F.2d 974, 979 (9th Cir. 1992); *Tucker*, 958 F.2d at 1418-1419; *Young* v. *Klutznick*, 652 F.2d 617, 624 (6th Cir. 1981), cert. denied, 455 U.S. 939 (1982). Indeed, Michigan officials might have chosen to rely upon unadjusted figures even if the Secretary had determined that an adjustment was appropriate.

Contrary to petitioners' assertions (Pet. 15-16), neither the court of appeals below, nor the decision in *Tucker* on which it relied, held that challenges to the conduct of the census are generally not justiciable. Indeed, the court in *Tucker* specifically rejected contentions that review was barred by the political question doctrine. 958 F.2d at 1415. Rather, *Tucker* focused on the question of whether the text and history of the Constitution provide a judicially enforceable right to a statistically adjusted census. *Id.* at 1416-1419. The holding in *Tucker*, adopted by the court below, that the Apportionment Clause does not include such a right, is correct and consistent with the decision in *Franklin*.[5]

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[5] Furthermore, in our view petitioners have no standing to pursue the constitutional claim presented in the petition. The sole basis for standing identified by the court of appeals was the possible impact on federal funds petitioners might receive in the future. Even if that impact would have sufficient concreteness to justify pressing a challenge under the Administrative Procedure Act, it does not establish an injury to the interests protected by the constitutional provision in question, which protects equal representation. See *Franklin*, 112 S. Ct. at 2776 (opinion of O'Connor, J.) (Massachusetts lacked standing to challenge accuracy of census data in absence of allegation that it would have had an additional Representative if allocation had used more accurate data).

2. Contrary to petitioners' suggestion (Pet. 11-14), the decision of the court of appeals does not meaningfully conflict with the decision of any other circuit. The only court of appeals decision petitioners cite as in conflict, *Carey* v. *Klutznick*, 637 F.2d 834, 838-839 (2d Cir. 1980) (per curiam), was decided long before this Court's decisions in *Franklin* and *Montana*, which clarified the applicable principles. The Court denied a petition seeking review of the same alleged conflict two years ago in *Tucker* v. *Department of Commerce*, 113 S. Ct. 407 (1992). We see no basis for different treatment of the petition in this case.

Furthermore, in our view the Census Act reflects Congress's intent to preclude judicial review of all challenges to the census except in circumstances where the plaintiff has standing based on an injury to its own constitutional rights (in which circumstances the Court has declined to infer preclusion of judicial review, see, *e.g.*, *Franklin*, 112 S. Ct. at 2776 (opinion of O'Connor, J.); *Webster* v. *Doe*, 486 U.S. 592, 603-605 (1988)). Because the injury on which petitioners rely here—an arguably lower share of federal grants—does not injure petitioners' constitutional rights in a manner cognizable under the Apportionment Clause, Congress could preclude judicial review based on such an injury. As we argued in our brief in *Franklin*, the structure of the Census Act—including its timetable for swift completion of the census process—evinces a strong intent to commit the conduct of the census to the Secretary's discretion and to preclude judicial review. See Brief for Appellants at 16-33, *Franklin* (No. 91-1502).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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